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No. 87-2078

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

GORDON PANTER, JIM MALLORY, LEO VINCENT, J. J. EDRINGTON, JOE TEDESCUCCI, R. L. FRENCH, JOHN W. VOGT, TILFORD WAGERS, JIM BURNS, KENNETH PEARL - - - - - Petitioners

versus

AMERICAN SYNTHETIC RUBBER CORPORATION, and

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, Local 423 and

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, International Union AFL-CIO-CLC - - Respondents

UNIONS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review in the petition are these:

1. Are laid-off employees who have allowed their union membership to lapse eligible to participate in the ratification of a new collective bargaining agreement between their former union and their former employer?

2. Are the negotiated recall rights of laid-off employees protected from modification through subsequent collective bargaining?

3. Does a collectively-bargained entitlement to severance pay survive the expiration of the collective bargaining agreement that created the entitlement?

4. Does an exclusive bargaining representative breach its duty of fair representation by negotiating and ratifying a new collective bargaining agreement with the employer of the employees in its bargaining unit?

Each issue should be answered in the negative.

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No. 87-2078

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v.

AMERICAN SYNTHETIC RUBBER CORPORATION, and
UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, Local 423 and
UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, INTERNATIONAL UNION AFL-CIO-CLC - *Respondents*

UNIONS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

OPINIONS BELOW

Most of the written decisions of the United States District Court for the Western District of Kentucky were omitted from the appendix attached to the petition. The omitted decisions are appended to this brief as Appendix A.

PERTINENT STATUTES AND REGULATIONS

In addition to the statutes specified in the petition, this case involves the application of the statutes and

regulations listed below and reproduced in Appendix B: 29 U.S.C. §§402(o), 411, 412, 1002(1) and 1051(1); 29 CFR §§452.86, 452.92.

STATEMENT OF THE CASE

Under the provisions of Article VII, §5(a)(4), of the Unions' Constitution, the Respondent Unions "shall" issue an Honorable Withdrawal and Transfer Certificate to a union member "who is laid off and fails to request dues exemption in accordance with Article VI, §3, Paragraph (b). . . ." Article VII, §5(d), of the Constitution provides that "[m]embers to whom Honorable Withdrawal and Transfer Certificates have been issued forfeit all rights and privileges in the Local Union and the URW."

Under the provisions of Article VI, §2, of the Consituation, each member of the Unions must make a monthly dues payment to the Unions. Article VII, §3, provides that an arrearage of three months in the payment of dues causes a member to "automatically forfeit all rights and good standing in the Local Union and in the URW." However, Article VI, §3, provides that Union members on layoff who have "recall rights" may obtain an exemption from their dues obligation. The exemption is renewable at ninety-day intervals.

Petitioners were laid off in 1981 by the American Synthetic Rubber Corporation due to a lack of work. The Petitioners paid no union dues after their layoff. Gordon Panter was the only Petitioner who requested and received a dues exemption. Panter never re-

quested an extension of this initial ninety (90) day exemption. Therefore, all of the Petitioners, except Panter, were removed from the membership rolls of the Unions after they had fallen three months behind in the payment of membership dues. Panter was removed from the Unions' membership rolls three months after his dues exemption expired.

Almost two years after all of the Petitioners had given up the rights and privileges of Union membership, the Unions and American Synthetic Rubber Company began negotiations for a new collective bargaining agreement. Negotiations began on January 6, 1984. On December 29, 1983, the Company had informally advised the Unions that its major objective in the negotiations was to terminate the recall rights of laid off employees. Even at that early point, the Company had determined that it was prepared to face a strike, if necessary, in order to obtain a termination of the laid off employees' recall rights. Under the 1981 collective bargaining agreement that expired on March 1, 1984, the Petitioners' right to be recalled from layoff was subject to no explicit temporal limitation.

The local Union immediately notified each Petitioner of the Company's bargaining position on the recall issue. It was not until after Local Union President Stringfield had met with all the Petitioners, that the Union and Company exchanged their first bargaining proposals with respect to the Petitioners' rights of recall. The Local Union went to great lengths to

keep the Petitioners advised throughout the bargaining process.

Even after the laid off employees relinquished their membership in the Unions, they were extended every courtesy by the Unions, except the right to vote on matters of Union business. They were allowed to attend and speak at Union meetings. However, none of the Petitioners were ever allowed to vote on any matter of official business brought before the membership at any Union meeting conducted after they relinquished their Union membership. Only one laid off employee, Dohoney, not a Petitioner in this action, testified that he had ever been permitted to vote at a Union meeting subsequent to receiving an Honorable Withdrawal and Transfer Certificate. However, Dohoney admitted that nobody had ever raised a question as to his eligibility to vote at any of the meetings. Nor was he able to testify that he ever had cast the deciding vote on any matter subject to a referendum of the membership.

The Unions *never* "prepared and agreed" upon any list of employees who were to lose recall rights and be denied a vote upon the ratification of a new agreement. The record is clear that these lists were prepared *by the Company.*

During negotiations, the Unions diligently sought to prevent the Company from limiting the Petitioners' right of recall from layoff. Donald Schmidt, the Company's Director of Manufacturing, testified before the district court that the Unions' were vocal throughout the negotiations in their efforts to preserve the Peti-

tioners' recall rights. The Unions proposed compromises on other issues in an effort to persuade the Company to modify its position with respect to the question of recall. These Union proposals included offers to relinquish other rights previously granted by the Company. But not even these efforts were successful. The Company rejected the Union's offers of compromise. Not even the assistance of a federal mediator was sufficient to cause the Company to alter its position. The mediator advised the Unions that the Company would never change its position with respect to the issue of recall.

After weeks of hard bargaining, the Company, not the Unions, first proposed treating the recall rights of laid-off workers differently from the recall rights held by employees who were then actively employed. The Company's "last, final and best offer," dated March 1, 1984, proposed the termination of the rights of recall held by employees who were laid off at that time.

At the time they were laid off, the Company gave the Petitioners and other similarly situated employees the option of terminating their employment and receiving severance pay, or declining severance pay and awaiting recall to employment. Of the approximately 150 employees who were laid off, only the Petitioners declined the Company's offer of severance pay. The Company asserted that if its "last, final and best offer" were ratified by the Unions' membership, the Petitioners' eligibility to receive severance pay upon resignation would terminate. The Petitioners would no longer

be laid off employees; they would be former employees. After consultation with the Unions' legal staff, the Unions proposed that the Petitioners' eligibility for a severance award be extended for a period of thirty days following any ratification of the Company's "last, final and best" proposal. However, the Company was willing to extend the Petitioners' eligibility for only a period of 48 hours.

The Unions' bargaining committee submitted the Company's "last final and best" proposal to a ratification vote of the Unions' membership on March 7, 1984. The bargaining committee did not recommend either acceptance or rejection of the Company's proposal. The Company's proposal was approved by the Unions' membership by a vote of 79 to 7. Even if the Petitioners had cast votes against ratification of the 1984 agreement, the contract would have been approved by over 81% of the Union members who voted. A simple majority was sufficient to ratify the agreement.

The Petitioners were not permitted to speak or vote at the March 7, 1984, ratification meeting. Local Union President Stringfield had explained to the Petitioners in January, 1984, that they would not be permitted to vote on the ratification of a new contract under the provisions of the Unions' constitution. Stringfield forbade the Petitioners from speaking at the March 7, 1984, meeting because he "didn't want an ugly situation to develop." The Union's membership had been "in a boisterous mood, uncontrolling, uncontrollable," in a meeting conducted on March 1, 1984, at which the

Petitioners were allowed to speak. Stringfield felt that "the possibility that a conflict between the regular members and these members [the Petitioners] on the issue of striking was a highly emotional issue, and I felt it could get out of control." The Petitioners had been given an opportunity to voice their opinions at all previous Union meetings.

REASONS FOR DENYING THE WRIT

ARGUMENT

a. Summary

No important questions of federal law are presented by the Petition. The circuit courts of appeal are in agreement in holding that the claims asserted by the Petitioners merit no relief.

Petitioners have no enforceable rights under the provisions of 29 U.S.C. §§411 or 412 because they are not "members" of the Unions, within the meaning of 29 U.S.C. §402(o). The Unions did not unfairly represent the Petitioners' interests in their efforts to cope with the Company's hard bargaining position on the subject of recall rights. The Union's compliance with the will of the majority of the bargaining unit was not arbitrary, discriminatory, or in bad faith. The Unions did not deprive the Petitioners of severance pay. Petitioners alleged entitlement to severance pay benefits is not vested under the provisions of ERISA.

b. The Petitioners Were Not Entitled to Participate In The Ratification Of The Unions' 1984 Contract With The Company.

Petitioners have presented no valid claim under the provisions of 29 U.S.C. §412 for vindication of rights secured by the provisions of 29 U.S.C. §411. "[If] an individual has failed to comply with the membership requirements of a labor organization, that individual may not obtain relief under the Act." *Brennan* v. *Local 357, International Brotherhood of Teamsters,* 709 F. 2d 611, 614 (9th Cir. 1983). "Non-union employees have no voice in the affairs of the Union." *NLRB* v. *Financial Institution Employees of America,* 475 U.S. 192, 205 (1986); *NLRB* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 191 (1967). Here, the Petitioners have not stated a valid claim under the provisions of 29 U.S.C. §412 because they had not fulfilled their dues obligation, nor obtained an exemption from that obligation, and were not "members" of the Unions on March 7, 1984, when they were forbidden from speaking and voting on the Company's "last, final and best" contract proposal.

"It is well settled that a union's consistent interpretation of its own constitution will not be disturbed by a federal court unless the challenged regulation is 'unreasonable.'" *Taylor* v. *Great Lakes Seaman's Union,* 701 F. 2d 590, 592 (6th Cir. 1983); *see, International Brotherhood of Boilermakers* v. *Hardeman,* 401 U.S. 233 (1971). Here, the constitution binding the Unions and the Petitioners, as members of the Unions, required the Petitioners to make monthly dues payments

in order to maintain their membership. Unless the Petitioners obtained a dues exemption, then either issuance of an Honorable Withdrawal and Transfer Certificate, or an arrearage of three months in the payment of dues, automatically resulted in the termination of their membership rights. Under these circumstances, the federal appellate courts agree that the Petitioners had no rights under 29 U.S.C. §412. *Taylor* v. *Great Lakes Seaman's Union,* 701 F. 2d 590 (6th Cir. 1983); *Brennan* v. *Local 357, International Brotherhood of Teamsters,* 709 F. 2d 611 (9th Cir. 1983); *Williams* v. *International Typographical Union,* 423 F. 2d 1295 (10th Cir. 1970).

The import of these cases is made all the more apparent by comparing them with the decisions upon which the Petitioners place primary reliance.

In *Alvey* v. *General Electric Company,* 622 F. 2d 1279 (7th Cir. 1980), a union forbade laid off employees from voting upon a proposal to modify seniority rules which would have directly affected their priority for recall. The laid off union members were prevented from voting because the union's constitution provided that "only members in good standing may participate in union affairs" and members could maintain their good standing only by making timely dues payments. Under the provisions of that union constitution, "not only were laid off members not required to pay dues, but *they were prohibited from making a voluntary payment of dues in order to maintain their good standing.*" *Id.* at 1283 (emphasis added). Under that constitutional provision, "members on layoff are barred

from participating in all union matters regardless of their willingness to pay dues. . . ." *Id.* at 1285.

Alvey is distinguishable from the circumstances existing in this case. In *Alvey,* the union members' ineligibility to vote was thrust upon them, regardless of their willingness to satisfy their dues obligation. Here, the Petitioners were ineligible to vote upon the Company's "last, final and best" contract proposal because the Petitioners *chose* not to tender dues payments to the Unions,[1] and *chose* not to avail themselves of the dues exemption available under the provisions of the constitution. The Petitioners here, like the complaining union members in *Taylor, Brennan,* and *Williams,* had options available to them which would have insured their right to participate in the voting. In choosing not to avail themselves of those options, the Petitioners voluntarily withdrew from membership in the Unions and relinquished their rights under 29 U.S.C. §411. *See,* 29 U.S.C. §402(o).

Local Union President Stringfield testified that he advised the laid off employees of their right to make a written request for a dues exemption. The official minutes of the Unions' meeting of December 4, 1980, indicate that the dues exemption provisions of the constitution were explained to the Unions' membership at that meeting. However, even if the dues exemption provisions of the constitution had never been explicitly

[1]29 CFR §§452.86 and 452.92 may have preserved the Petitioners' rights of membership, if they had chosen to tender the necessary dues payments. Petitioners did not comply with these regulations.

pointed out to the Petitioners, the Petitioners would still be bound by the provisions of the Constitution.

In *Baldini* v. *Local Union No. 1095, UAW*, 581 F. 2d 145 (7th Cir. 1978), *overruled on other grounds, Rupe* v. *Spector Freight Systems,* 679 F. 2d 685 (7th Cir. 1982), and *Newgent* v. *Modine Manufacturing Company,* 495 F. 2d 949 (7th Cir. 1974), *overruled on other grounds, Rupe* v. *Spector Freight Systems, supra,* discharged employees brought suit against their unions alleging a breach of the unions' duty of fair representation.[2] The Petitioners attempted to explain their failure to exhaust available intra-union remedies by asserting that (1) they were unaware that the intra-union remedies were available and (2) union officials had misled them with respect to the availability of such remedies. In *Newgent,* the president of the union had advised Newgent that "further intra-union steps would be senseless and fruitless." 495 F. 2d at 922. In *Baldini,* a union official had advised Baldini that "nothing more could be done for him" after the union failed to meet a contractual deadline for the submission of Baldini's dispute to arbitration. 581 F. 2d at 148.

In both *Baldini* and *Newgent,* it was held that a union member assumes the responsibility of becoming aware of the obligations imposed upon him under the terms of his union's constitution and bylaws. A union

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[2]*Rupe* overruled *Baldini* and *Newgent* in order to comply with *Clayton* v. *UAW,* 451 U.S. 679 (1981). 679 F. 2d at 690-691. *Baldini* and *Newgent* still support the general principal that a union member is bound to comply with the requirements of his union's constitution.

member is not entitled to rely upon misstatements of union officials as an excuse for his ignorance of the relevant provisions of his union's constitution. Union constitutions are public records, freely available from the United States Secretary of Labor. *See,* 29 U.S.C. §§431(a) and 435. This fact, together with a union member's obligation to thoroughly familiarize himself with the provisions of the union's constitution, render alleged misstatements of union officials immaterial. 581 F. 2d at 148; 495 F. 2d at 927-928.

Gray v. *International Association of Heat and Frost Insulators and Asbestos Workers,* 447 F. 2d 1118 (6th Cir. 1971) is consistent with the *Baldini* and *Newgent* decisions. There, it was held that the acceptance of an application for union membership, when considered together with the provisions of the union's constitution and bylaws, constitutes a written contract binding the union and its members. "By becoming a member of a union, the worker, in effect, makes a contract that he is to be governed by the constitution and by-laws of the organization." *Cleveland Orchestra Committee* v. *Cleveland Federation of Musicians,* 303 F. 2d 229, 230 (6th Cir. 1962). Therefore, the Petitioners in this case were contractually bound to adhere to the provisions of the Unions' Constitution.

Had the Petitioners in this case adhered to the provisions of the Unions' Constitution, the Petitioners would now have no claim against the Unions. Clearly, it is their own failure to apply for and maintain a dues exemption that is the source of their present plight.

Christopher v. *Safeway Stores, Inc.*, 103 LRRM 2018 (E.D. Tex. 1979), cited by the Petitioners, held that a local union violated its own constitution, and 29 U.S.C. §411, by negotiating a new collective bargaining agreement which changed the manner in which its members' seniority credit was computed, without notifying the affected members of the negotiated change or allowing those members to vote upon its ratification. Here, the Unions hid nothing from the Petitioners. Nor did the Unions violate their constitution. Rather, the Unions advised the Petitioners, months in advance of the contract ratification, of the company's assault upon the Petitioners' recall rights and that the Unions' constitution did not entitle the Petitioners to voting rights with respect to the new agreement. The Petitioners sought no intra-union appeal from the ruling regarding their right to vote. *Christopher* is distinguishable on this basis.

c. The Petitioners' Recall Rights Were Subject To Modification Through Collective Bargaining.

The Petitioners argue that their recall rights were "status benefits" which the Unions and Company intended to irrevocably vest in the Petitioners in the manner described in *United Auto Workers* v. *Yard-Man, Inc.*, 716 F. 2d 1476 (6th Cir. 1983). Petitioners cite no decision extending the *Yard-Man* rule to contractual rights unrelated to pension benefits. Public policies reflected in ERISA demonstrate that pension benefits are entitled to special protection. However, those policies do not necessarily afford similar protec-

tion to all negotiated benefits. *See, e.g., White Farm Equipment Co.* v. *White Motor Corp.*, 788 F. 2d 1186 (6th Cir. 1986).

If the *Yard-Man* rule were extended to all contractual benefits negotiated by an employer and union, the parties to a collective bargaining agreement would never be able to modify the provisions of their agreement as changing conditions require. Contractual rights created in one agreement would become permanently vested in the employees covered by that agreement, depriving the contracting parties of their discretion to modify those contractual rights in future agreements. Extension of the *Yard-Man* rule to benefits unrelated to pensions threatens the concept of *collective* bargaining. Individual members of the bargaining unit would enjoy different, irrevocable employment benefits, established over the course of their respective employments, in dozens of different and conflicting labor agreements.

Further, the collective bargaining agreements executed by the Unions and Company in this case do not indicate that it was a parties' intention to make the Petitioners' recall rights irrevocable. Article XXIV of the 1981 agreement provided that all provisions of the agreement were subject to modification through negotiation. Although the record does not support the Petitioners' assertion that their allegedly unlimited recall rights were incorporated into every bargaining agreement executed since 1959, if we assume this contention to be true, it would be apparent from the repeated negotiation of such a contract provision that the

parties never intended the recall rights originally negotiated in 1959 to be irrevocable. Why else would they have bothered to include a recall provision in every bargaining agreement negotiated since 1959?

An employee's seniority rights arise exclusively from the labor-management agreement. These rights are not vested. "The incidents of seniority can be freely altered or amended by modification of the collective bargaining agreement." *Charland* v. *Norge Division, Borg-Warner Corporation,* 407 F. 2d 1063, 1064 (6th Cir. 1969); *Local 1251, UAW* v. *Robertshaw Controls Co.,* 405 F. 2d 29, 33 (2nd Cir. 1968).

d. The Unions Did Not Breach Their Duty Of Fair Representation.

Although the Petitioners allege federal jurisdiction under 29 U.S.C. §185(a) and claim that the Unions breached their duty of fair representation, Petitioners have neither alleged nor proven any "violation of contracts between an employer and a labor organization . . . or between any such labor organizations . . .," the jurisdictional fact upon which suits under §185(a) must be based. Rather, the Petitioners complain of the Unions' negotiation, execution and *compliance* with such a contract. Obviously, 29 U.S.C. §185(a) cannot be the source of the Petitioners' "fair representation" claim, nor the jurisdictional basis of this action. *Adams* v. *Budd Company,* 349 F. 2d 368 (3rd Cir. 1965); *Leskiw* v. *IBEW,* 464 F. 2d 721 (3rd Cir. 1972), *cert. den.,* 409 U.S. 1041 (1972).

The true essence of the Petitioners "fair representation" claim is merely their dissatisfaction with the actions taken by a majority of the collective bargaining unit in ratifying a new contract with the Company. Their dissatisfaction is not sufficient to support this lawsuit. *Ford Motor Company* v. *Huffman,* 345 U.S. 330 (1953); *Humphrey* v. *Moore,* 375 U.S. 335 (1964); *Shamblin* v. *General Motors Corporation,* 743 F. 2d 436 (6th Cir. 1984).

> . . . [W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. . . . Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

Humphrey v. *Moore, supra* at 349-350.

Here, the Unions were faced with only two options: accept the Company's last, final and best offer or strike. The Unions' negotiating committee turned the decision over to the membership without a recommendation. The membership decided, by a vote of 79 to 7, not to strike.

Petitioners argue that the Unions' bargaining committee breached a duty owed to the Petitioners by failing to persuade an unwilling majority of the Unions' membership to reject the employer's "last, final and best offer" and initiate a strike. Petitioners claim

that their right to be recalled from layoff would have been preserved by this course of action. This claim is false. After several months of hard bargaining, the Company's clearly-stated bargaining position remained unchanged: The recall rights of laid off employees must be terminated, regardless of the Unions' threat to strike. Under these circumstances, it is quite likely that rejection of the employer's "last, final and best" contract proposal, and the initiation of an economic strike, would have resulted in nothing other than a bargaining impasse on the recall issue. Such an impasse would have authorized the employer to implement its "last, final and best" offer regardless of the Unions' opposition. *NLRB* v. *Katz,* 369 U.S. 736 (1962); *NLRB* v. *Crompton-Highland Mills, Inc.,* 337 U.S. 217 (1949). Because no option available to the Unions could have insured the preservation of the Petitioners' recall rights upon the expiration of the 1981 bargaining agreement, there was no justification for the Petitioners' insistence on a strike that was disfavored by the vast majority of the Unions' membership.

e. The Petitioners' Rights To Severance Pare Are Not Protected From Modification by ERISA.

The Unions did not interfere with the Petitioners' attainment of severance pay due them under the 1981 collective bargaining agreement. Rather, the Unions negotiated an *extension* of those rights beyond the termination date of the 1981 agreement. The Unions

enhanced, rather than hindered, the Petitioners' opportunity to receive severance pay.

Moreover, the Petitioners had no vested rights in the severance pay benefits made available under the 1981 agreement. The "vesting" provisions of ERISA do not apply to "an employee welfare benefit plan," as defined in 29 U.S.C. §1002(1). 29 U.S.C. §1051(1); *White Farm Equipment Company* v. *White Motor Corporation,* 788 F. 2d 1186, 1191-1193 (6th Cir. 1986). Because the Petitioners' severance pay benefits were, if anything, a "welfare benefit," those benefits were subject to modification through collective bargaining. 29 U.S.C. §1140 protects only vested rights, not a "welfare benefit" such as severance pay. *See, Sutton* v. *Weirton Steel,* 724 F. 2d 406, 410-411 (4th Cir. 1983); *West* v. *Butler,* 621 F. 2d 240, 245 (6th Cir. 1980).

CONCLUSION

For these reasons, the writ should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 84-0293 L(A)

GORDON PANTER, et al, - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER CORPORATION, et al., - - - - *Defendants.*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION—Entered Dec. 17, 1984

Gordon Panter and nine (9) other former employees of American Synthetic Rubber Corporation, hereinafter ASRC, bring this action against ASRC and the United Rubber, Cork, Linoleum and Plastic Workers of America, International Union, hereinafter URW International Union, and its affiliate, Local 423, hereinafter Local 423. Panter and the other plaintiffs are former union members. Plaintiffs allege jurisdiction under 29 U.S.C. §185, the Labor Management Relations Act (LMRA), 29 U.S.C. §401 *et seq.*, the Labor Management Reporting and Disclosure Act; (LMRDA), and, in their amended complaint, under KRS 344, the Kentucky Civil Rights Act, by pendent jurisdiction.

The case is before the Court on plaintiffs' motion for injunctive relief requiring ASRC to reinstate them to their former positions, and on the defendants' motions for summary judgment. We will resolve these issues in order.

In March of 1981, ASRC and Local 423 entered into a collective bargaining agreement which provided that all employees with two or more years of seniority had unlimited recall rights upon layoff. The agreement expired on March 1, 1984, at which time ASRC and Local 423 negotiated a new collective bargaining agreement. The new agreement terminated the recall rights of all employees who had been on layoff for more than two years, and provided severance pay for all laid-off employees who agreed to waive any claim to further employment. The plaintiffs were among those affected by this agreement, because they were on layoff at that time and, for the most part, had been on layoff since the summer of 1981. Almost all the plaintiffs are over forty years of age.

After negotiating the new contract, the union leadership submitted the proposed agreement to a ratification vote by the union membership. The union leadership refused the plaintiffs both the right to speak at the meeting, as well as the right to vote on the proposed agreement. The union membership ratified the proposed contract by a sufficient margin, so that the plaintiffs' votes would not have changed the result. Subsequently, the plaintiffs filed this action, alleging a breach of contract against ASRC, a breach of the duty of fair representation, and a violation of the union members' "bill of rights" against Local 423 and the International Union, and age discrimination against both the union and the employer.

Mr. Max Stringfield, Local 423 President, informed the plaintiffs that they "probably" would not be allowed to vote on the proposed contract, subject to the decision of the International Union, which later concurred in his decision. Under the union Constitution, members on layoff are required to obtain a Dues Exemption Certificate in order to preserve their membership rights while on layoff. URW Constitution, Article VI, Section 3(a)(1) and 3(B).

If a union member is laid off and fails to request a Dues Exemption Certificate, the URW Constitution directs that the union issue that member a Honorary Withdrawal and Transfer Certificate, Article VII, Section 5(a)(4), which "forfeit[s] that member's rights in the local union and the [International]." Article VII, Section 5(d).

The Constitution limits a member's right to a dues exemption of twelve months, after which the union must issue the member an Honorary Withdrawal and Transfer Certificate, but the member may request an extension from both the local and the International Union. Article VI, Section 3(d). The union contends that the plaintiffs failed to take advantage of the dues exemption, and that they have no legitimate complaint concerning the union's refusal to allow them the right to vote on the proposal or to speak at the meeting. *See generally,* Tr. Vol. II at 27-32.

The plaintiffs presented testimony that they were unaware of the Dues Exemption Certificate requirement, or that Mr. Stringfield told them that the cards "were automatically issued." Tr. Vol. 1 at 48, 49, 72, 81, 86, 94-95, 99, 173-74, 187; Vol. II at 191-92. However, the plaintiffs admitted that they did not vote on any issues while they were on layoff. Tr. Vol. I at 59, 75, 83-84, 97-98, 189, and Tr. Vol. II at 62, although one witness for the plaintiffs, Mr. Dohony, testified that he voted and spoke at meetings while on layoff. Tr. Vol. II at 112-15.

The evidence does indicate that the union represented various plaintiffs on several grievances and at disability hearings during the time that they were on layoff and should have possessed a Dues Exemption Card or an Honorable Withdrawal and Transfer Card. Tr. Vol. I at 142, 144, 188; Vol. II at 38-39. The evidence also indicates some confusion by the plaintiffs over the precise function of the two cards. *E.g.,* Tr. Vol. I at 77-78, 98-99; Vol. II at 3-4. However, the evidence also indicates that the union did

explain the distinction during the December 1980 meeting, although Mr. Dohony, the individual who was listed in the official minutes as having made the representation, testified that he did not know the difference himself. Tr. Vol. II at 3-4.

We also note that the union took a vote to authorize the union leadership to call a strike. The union leadership allowed Mr. Panter to speak at the meeting but did not allow the plaintiffs to vote. Mr. Stringfield testified that the plaintiffs did not request the right to vote at that meeting, and that they did not contest is decision not to allow them to vote. Tr. Vol. II at 65-66. Mr. Stringfield did testify that these members on layoff were allowed to speak at most union meetings as a "courtesy." Tr. Vol. I at 102-03, 114. He testified that he did not allow the plaintiffs to speak at the ratification meeting because he "didn't want an ugly situation to develop. They weren't allowed to vote anyway," and because he "felt that the possibility that a conflict between the regular members and those members on the issue of striking was a highly emotional issue, and I just felt it could get out of control." Tr. Vol. I at 116, *See also,* Tr. Vol. I at 134-36.

The plaintiffs claim that the union did not represent them adequately in the negotiation process. Essentially, the plaintiffs allege that the union did not bargain "tough enough" with the company during the negotiating process, *e.g.,* Tr. Vol. I at 92, and that there was a "conspiracy" between the union and the company which led to the termination of the plaintiffs' seniority rights. The plaintiffs argue that the union should have called a strike to support the contract demands because the membership had authorized a strike at a previous meeting.

The plaintiffs also introduced evidence of two "suspicious" meetings between union officials and company officials. The first meeting occurred on December 29, 1983,

at the Fifth Quarter Restaurant in Louisville, Mr. Stringfield and Mr. Yarbrough, a representative of the International, represented the union, while Mr. Schmidt and Mr. Wall represented the company. The parties testified that the ASRC used this meeting to inform the union that it would seek termination of the plaintiffs' recall rights. Tr. Vol. I at 117-18; Vol. II at 57-58. The evidence indicates that the union officials promptly informed the members of the plaintiff class about the company's forthcoming proposal.

Mr. Leo Vincent testified that he saw Mr. Stringfield and Mr. Wall, an ASRC official, at the Fifth Quarter at some unspecified earlier time in the fall, presumably on October 8, 1983, the Stringfield's anniversary. However, the record is not clear whether Mr. Vincent alleged that Mr. Stringfield and Mr. Wall sat together or separately, and we have no other reference in the record to this alleged incident, which would have occurred some three months prior to the beginning of negotiations. *See* Tr. Vol. I at 174-75; Vol. II at 56-57.

ASRC proposed that employees would lose recall rights after one (1) year, whether or not they were currently on layoff. Tr. Vol. I at 104. Subsequently, ASRC modified its proposal to apply only to those employees who were then on layoff. Tr. Vol. I at 104-05. The union responded with a counteroffer, which would have given those persons on layoff recall rights for two years or a time equal to their seniori;y, whichever was shorter, from the date of the agreement, as well as a complete probationary period. Moreover, this clause would not apply to persons employed as of the date of the agreement. Tr. Vol. I at 105-07.

ASRC responded with a "last, best, and final" offer (on the same day the old contract expired) which provided that all employees who had been on layoff for more than two (2) years would lose their recall rights, but that the provision

would not apply to those persons who were then employed or who were receiving accident and sickness benefits. Vol. I at 108. *See also,* Tr. Vol. II at 44-47, 67-70. The union attempted to obtain a one-month period for those persons who were losing their recall rights to obtain their severance pay. ASRC refused and the parties eventually settled on 48 hours. Understandably, the plaintiffs argue that this provision placed a certain amount of compulsion upon them to accept the severance pay and renounce any claim to future employment.

Mr. Stringfield testified that he kept Mr. Panter, the acknowledged leader of the plaintiffs' group, fully informed of the progress of the negotiations, and that he gave him a list of laid-off employees and their telephone numbers so that he could set up a committee of those people who would be affected by this proposal. Mr. Panter does not dispute this testimony.

Mr. Stringfield and the other union leaders presented the proposed agreement to the union membership without any recommendation whether to accept or reject the proposal. Tr. Vol. I at 110. The membership accepted the proposal by a vote of 79-7. Tr. Vol. II at 71. The membership had authorized the union leadership to call a strike by the vote of 98-3. However, Mr. Stringfield testified that the union membership was opposed to a strike, and the strike vote was taken as a negotiating tactic. Tr. Vol. II at 92-3, 103-05. Mr. Stringfield testified that under normal procedure, if "the final offer of the tentative agreement is turned down, then the strike is called." Tr. Vol. II at 92. In essence, if the membership had rejected the tentative agreement, i.e., ASRC's "last, best, and final" offer, the local leadership would have sought permission from the International Union to call a strike. According to Mr. Stringfield, the Local could not call a strike without permission

from the International, even after taking a strike vote. Tr. Vol. II at 100-01.

The plaintiffs also attack the Local's acceptance of an ASRC proposal in late 1983 which allowed employees the right to choose between possible retirement plans. Apparently, ASRC was concerned that certain employees would retire before the beginning of the new contract. Thus, ASRC offered the employees the chance to choose to retire under the provisions of the old contract (pre-March 1, 1984) or under the new contract (post-March 1, 1984). ASRC officials testified that the company was afraid of losing valuable employees just when it was beginning to rebuild its business. Thus, ASRC improved its pension plan offer under the new contract and allowed employees the options of retiring under either contract. Tr. Vol. I at 156-59. *See also,* Vol. II at 51-54, 66-67.

ASRC official Don Schmidt also testified that the reason that the company pushed the recall clause so hard was that the company was unwilling to rehire some 35 of the approximately 50 workers on layoff, although he did not identify any of the plaintiffs as belonging to that category. Tr. Vol. I at 151-54. Mr. Schmidt admitted that the workers had nothing adverse in their disciplinary records, but that it was possible for a person to be a poor worker and still not have any disciplinary record. Mr. Schmidt stated that the company felt very strongly about the clause and was willing to accept a strike in order to obtain the desired clause. Tr. Vol. I at 166.

Mr. Stringfield also testified to the company's adamant position and to the hard bargaining that went on between the parties. He agreed that he believed that the company would accept a strike. He also testified that he arranged for the intervention of a Federal Mediator, and that the Mediator advised him that the company appeared likely

to accept a strike if it did not achieve its goal of cutting off the plaintiff's recall rights. Tr. Vol. II at 67-72.

With respect to the plaintiffs' motion for injunction, we believe that the Sixth Circuit Court of Appeals' decision in *Aluminum Workers International* v. *Consolidated Aluminum Corporation,* 696 F. 2d 437, 442-44 (1982) is dispositive. In that case, the parties had entered into a collective bargaining agreement which contained a broad grievance and arbitration provision. The corporation-appellant notified the appellee union that it intended to restructure certain job classifications with the ultimate effect of eliminating 16 employees. The union objected and asserted that the company did not have the right to make the reclassifications. When the company implemented its plan, the union filed suit and the District Court ordered the company to reinstate the 16 laid-off employees, and to return to the *status quo ante* pending arbitration.

On appeal the Appellate Court held that the union could not prove that it would suffer irreparable harm. The Court, in essence, held that loss of employment, which is the result of job eliminations by a solvent employer, will not support a claim by the union for injunctive relief, if the employer is solvent and has the ability to reinstate its employees or pay the wages for the period of unemployment. Judge Martin, speaking for the Court, held that although the union could point to repossessions, foreclosures, and injury to credit status which might befall the 16 jobless employees, these potential damages were speculative, and would materialize only in select cases, and only when the parties were unable or unwilling to commence arbitration. *Id.,* at 444.

Judge Martin also referred to the availability of unemployment relief, health insurance, and financial support from the union, and to the fact that the award of back pay could be used to repair any damage to credit or to re-

purchase goods repossessed by creditors during the arbitration. *Id.*, at 444. While the Sixth Circuit opinion heavily emphasized the various effects that the injunction would have on the arbitration process, the Court, for a third time on page 445, stated that the critical issue was whether the injuries complained of could not be adequately redressed by an arbitrator's award.

In the instant case, we do not have an arbitrator's award but we do have a complaint for damages. While we perceive no threat to the arbitration process here, since none is involved, we believe that the potential right to damages is to be considered in the same light as is the potential right to back pay where arbitration is concerned.

Even if the element of irreparable injury were present, we do not believe that plaintiffs have met all of the four tests which must be addressed before a preliminary injunction is issued. They are set out in *Mason County Medical Association* v. *Knebel*, 563 F. 2d 256 (6th Cir. 1977) and are as follows:

> 1. Whether the plaintiffs have shown a strong or substantial likelihood ir probability of success on the merits;
>
> 2. Whether the plaintiffs have shown irreparable injury;
>
> 3. Whether the issuance of a preliminary injunction would cause substantial harm to others;
>
> 4. Whether the public interest would be served by issuing a preliminary injunction.

In the case at bar, for reasons which will be more fully discussed in the opinion, we do not believe that plaintiff has shown a probability of success on the merits. We, therefore, overrule plaintiffs' motion for an injunction ordering the ASRC to recall plaintiffs.

Plaintiffs allege that their rights under the Landrum-Griffin Act were violated by the union. *See* 29 U.S.C. §411 *et seq.* The plaintiffs rely heavily upon *Alvey* v. *General Electric Company,* 622 F. 2d 1279 (7th Cir. 1980). In that case, the union's constitution required members in good standing to pay dues but prevented members on layoff from making dues payments. Therefore, those persons on layoff had no chance to either speak or vote at a union meeting, during the course of which the union membership adopted a contract proposal which affected their recall rights.

The *Alvey* Court held that the union had violated 29 U.S.C. §411(a)(1) by barring the members "from participating in *all* union matters regardless of their willingness to pay dues or the extent to which the union matters may compromise, or as here, extinguish, their rights." *Id.* at 1285. The *Alvey* Court also stated that a member on layoff remained "a member in substance" until he withdrew or was "expelled or suspended after appropriate proceedings," *Id.* at 1284; *See also,* 29 U.S.C. §402(o). Other courts, however, have held that a union may limit voting to members in "good standing" or limit voting to those whose interests are directly affected by the issue." *See American Postal Workers Local 685* v. *American Postal Workers Union,* 665 F. 2d 1096, 1103 (D.C. Cir. 1981) and *Taylor* v. *Great Lakes Seaman's Union, Local 5000,* 701 F. 2d 590, 591-92 (6th Cir. 1983).

The primary concern in *Alvey* was that the union constitution prevented members on layoff from exercising their rights while on layoff. In the instant case, the union Constitution allowed members to obtain a Dues Exemption Card which would allow them to continue to participate in union meetings as members. In fact, the evidence shows that Panter himself and another plaintiff, Mr. Foster, did obtain these cards for one year, but that they did not attempt to renew them.

As the *Alvey* Court points out, when considering a challenge to a union's rules concerning a member's good standing, this Court must consider a balance between the " 'anti-democratic effects' of the rule and the [union] interests urged in its support'." 622 F. 2d at 1283 (citing *United Steelworkers* v. *Usery*, 429 U.S. 305, 310 (1977).

In this case, the union has a legitimate interest in making sure that the union's decisions are made by those who are actively involved in the union's activities. The union has a legitimate interest in requiring that those persons who are interested in working with the union and availing themselves of union benefits demonstrate that interest by becoming sufficiently involved in the union that they maintain some specific official tie to the union, i.e., by maintaining a Dues Exemption Card, which, as we noted above, is renewable.

In this case, the plaintiffs could easily request a Dues Exemption Card. In fact, two plaintiffs performed that function. The union Constitution also provided a mechanism which allowed the plaintiffs to request an extension of the Dues Exemption Card after its expiration. Although none of the plaintiffs even attempted to apply for this extension, the plaintiffs allege that the union officials misled them into thinking that the dues exemption was automatic. We also note evidence that the union officials did explain members' duties at regular union meetings. Furthermore, the Constitution specifically spells out each member's duties with regard to payment of dues. While several plaintiffs testified that they did not possess a copy of the Constitution, we note that a union member has a duty to become familiar with his rights and duties as a union member and as a member of the bargaining unit. *E.g.*, *Baldini* v. *Local 1095*, 581 F. 2d 145, 148-49 (7th Cir. 1978); *Newgent* v. *Modine Manufacturing Company*, 495 F. 2d 919, 928 (7th Cir. 1974).

The plaintiffs also attempt to show that the union is estopped from denying them speaking and voting rights because of the union's course of conduct or practice of allowing the members on layoff to speak at prior meetings and allowing some of them to vote at some meetings. Again, we do not find any clear course of action. The plaintiffs' testimony, with the exception of Mr. Dohoney, agreed that they were not allowed to vote at union meetings.

The union's denial of the right to speak causes this Court some serious concern. The union had established a "practice and pattern" of allowing the members on layoff the chance to speak at most if not all meetings, including those where votes would take place. Mr. Stringfield based his decision not to allow the plaintiffs to speak upon both advice from International Union officials and on his fear of an "ugly situation."

In general, the plaintiffs complain that the union did not inform its members, either those active or those on layoff, of its meetings, rules, and regulations. The plaintiffs allege, for example, that union meetings were always held during the second shift, and that many of the plaintiffs worked the second shift and were unaware of the union's rules concerning the Dues Exemption Cards. Furthermore, the plaintiffs urge that there is no clear evidence supporting the union's claim that it informed the membership of all its activities. We agree that the union's conduct of its meetings leaves a great deal to be desired in the way of formalities and clarity in its record keeping. *See, e.g.*, Tr. Vol. II at 76-77, 99-100. We also believe that disputed issues of material fact remain; and therefore, the defendants' motion for summary judgment on the Landrum-Griffin claim is denied.

The plaintiffs' next allege a breach of the duty of fair representation. While the plaintiffs were not members of

the union in good standing, they were still members of the bargaining unit. In other words, the plaintiffs still had rights which flowed from the collective bargaining agreement, i.e., their recall rights. As long as they had those rights, the union was under a duty of fair representation to guard these rights. This case does not involve people who were no longer members of the bargaining unit as was the case in *Cooper* v. *General Motors Corporation*, 651 F. 2d 249, 250 (5th Cir. 1981).

However, the union has a very wide latitude in exercising that duty. As the Seventh Circuit has noted, the Supreme Court has established two separate standards for breach of the duty of fair representation. Initially, the Supreme Court allowed the union a "wide range of reasonableness" when negotiating contracts for the members which it represents. *Ford Motor Company* v. *Huffman*, 345 U.S. 330, 338 (1953.) Thus, as the *Alvey* Court noted, the union may lawfully "follow the dictates of the majority if they determined that the decision reflected a proper resolution of conflicting but legitimate interests." 622 F. 2d at 1289. On the other hand, the Seventh Circuit has noted that the Supreme Court defined a more specific and somewhat higher standard when dealing with employee grievances under the standard of *Vaca* v. *Sipes*, 386 U.S. 171 (1967). *See* 696 F. 2d 505, 514-15 (7th Cir. 1982). *See generally* Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 U. Ill. L.F. 35 (1979).

In this case, we confront a union's handling of a negotiation situation, which calls for the less severe "wide range of reasonableness" standard noted above. The plaintiffs argue that the union did not bargain "tough enough" in the words of Mr. Panter. Essentially, Mr. Panter and his colleagues assert that the union should have called a strike in order to protect their rights, and that the strike vote

indicated the union members' support for the plaintiffs' position. Mr. Stringfield testified that the vote was a negotiating tactic, and that the union members would not have supported a strike. He further stated that the union members could have indicated support for the plaintiffs by simply rejecting the contract. Finally, ASRC official Don Schmidt testified that the company would have taken a strike in order to get its desires.

Initially, we note that the issue of the breach of fair representation is a question of fact for a jury. *E.g., Cox* v. *C. H. Masland & Sons, Inc.,* 607 F. 2d 138, 142-43 (5th Cir. 1979); *Minnis* v. *International Auto Workers,* 531 F. 2d 850, 852-53 (8th Cir. 1975). The burden of proof is by a preponderance of the evidence, *Dill* v. *Greyhound Corporation,* 435 F. 2d 231, 237-38 (6th Cir. 1970), and this Court has jurisdiction over a breach of fair representation in negotiation claim under Section 301 of the LMRA, 29 U.S.C. §185. *Farmer* v. *ARA Services, Inc.,* 660 F. 2d 1096, 1106 (6th Cir. 1981).

We find summary judgment appropriate on this issue. Mr. Panter can only point to his generalized feelings that the union "should have bargained tougher" during negotiations or that the union should have called a strike. We find no authority for imposing a "duty to strike" on the union, and we find no factual allegation to support any claim that the union could have taken any step to preserve the plaintiff's recall rights other than a strike. While the Court may entertain some personal doubt as to the vigor with which the union presented its counter-proposals to the company, we have absolutely no doubt that the company had taken an adamant position on the question of recall rights and would have suffered a strike in order to preserve its position. Again, we find no evidence that the union could have taken any position which would have reached an agreement but still retained the plaintiff's recall rights. For example,

the plaintiffs have not offered any evidence that the union mmebership would have voted to strike if the union leadership had proposed a strike.

Furthermore, we note that the union must also represent the other members of the union. In effect, the union must balance the plaintiffs' rights along with the desires of the other members of the union. For example, the plaintiffs complain that the union accepted a company proposal in late 1983 which had the effect of allowing union members then employed to postpone retirement until after the adoption of the new contract. The new pension plan allowed the employees to retire under their choice of the better of the two agreements. This agreement effectively persuaded several older members not to retire until after the adoption of the new contract, which had eliminated the plaintiffs' recall rights. Thus, the company was able to replace the retired employees with new hires instead of recalling the plaintiffs with their established seniority.

We conclude that had the union refused to accept this plan, the current employees could have filed exactly the same type of action against the union for breach of the duty of fair representation as the plaintiffs have filed in this case. Simply put, we find a case of hard bargaining by the company which was able to exert its economic power against its employees. We find no law against "tough" bargaining, either by the company or by the union. As the Eighth Circuit recently noted, federal law requires bargaining, it does not require agreement. *Johnson* v. *Air Line Pilots,* 650 F. 2d 133, 137 n. 3 (8th Cir. 1981).

Very recently counsel for the defendant union called the Court's attention to the case of *Shamblin* v. *General Motors Corporation,* 743 F. 2d 436 (6th Cir. 1984). In that case, all of the plaintiffs were employees of General Motors and members of the UAW local union. All except one had been originally hired as unskilled production workers. Under

the General Motors-UAW contract, most General Motors workers acquire plant-wide seniority on a one-for-one basis. There was, however, a separate seniority list for skilled employees, and one-for-one skilled trades seniority was acquired only when an employee was actually working in a trade. Such seniority was issued for purposes of layoff and recall within the skilled trades classification.

Prior to the lawsuit, an unskilled employee who sought to enter the General Motors skilled trades program was required to work for four years before he acquired any seniority rights in the skilled trades classification. Thereafter, he would continue to work under supervision for four years, after which, having successfully completed the training program, he would be reclassified as a skilled trades journeyman and afforded four years of seniority within that skilled trades classification for his eight-year training period. In effect, such employees before December 13, 1976 received one-for-two seniority.

Effective December 13, 1976, General Motors and UAW, through collective bargaining, amended the seniority provisions. The amendment provided that participants in training for skilled trades would prospectively be afforded seniority on a one-for-one basis within the skilled trades classification. This provision was obviously advantageous to new unskilled workers, but was not retroactively applied to the plaintiffs who were in the skilled trades training program. The plaintiffs claimed that the UAW should have secured a seniority agreement which would have provided them retroactively with one-for-one seniority for their skilled trades training.

Circuit Judge Edwards, in his opinion for the Court affirming the district judge's grant of summary judgment to the defendants, cited language from both *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338-39 (1953) and *Humphrey* v. *Moore,* 375 U.S. 335, 349-50 (1964), which points out that

conflict between employees represented by the same union is a recurring fact, and that a wide range of reasonableness must be afforded to a statutory bargaining representative in arriving at a collective bargaining agreement. The cases further point out that the complete satisfaction of all members of the union in such circumstances is hardly to be expected. *Shamblin* v. *General Motors Corp., supra,* reinforces our conclusion that the defendants are entitled to summary judgment on the issue of fair representation.

Plaintiffs have also alleged age discrimination under Kentucky law, KRS 344.040 *et seq.* and seek injunctive relief in the form of reinstatement and also damages. We find nothing in the Kentucky Civil Rights Act that does away with the plaintiffs' burden of proving irreparable harm. While the plaintiffs cite *City of Los Angeles, Department of Water and Power* v. *Manhart,* 435 U.S. 702 (1978), we believe that the decisions of the Sixth Circuit Court of Appeals in *Aluminum Workers International* v. *Consolidated Aluminum Corporation, supra,* and *Equal Employment Opportunity Commission* v. *Anchor Hocking Corporation,* 666 F. 2d 1037 (6th Cir. 1982) are controlling. Therefore, we repeat our previous holding that plaintiffs are not entitled to injunctive reinstatement.

Plaintiffs complain that the impact of the collective bargaining agreement of 1984 is disproportionate upon plaintiffs who are 40 years of age and whose seniority is a result of their age. In *Farmer* v. *ARA Services, Inc.,* 660 F. 2d 1096 (6th Cir. 1981), the Court held that a union which participates in a negotiation of a collective bargaining agreement may be found liable to four of its members because the contract was discriminatory against the female members. *Id.,* at 1104 (citing cases).

Defendants move for summary judgment as to the age discrimination issue. Plaintiffs, in response, presented no discussion of their age discrimination claims. The tenor

of all the evidence presented at the preliminary injunction hearing also indicated that plaintiffs were relying on the issues of violation of the Landrum Griffin Act and the duty of fair representation, rather than upon any age discrimination claim. No evidence was presented by the plaintiffs as to whether or not plaintiffs are younger than the employees presently working in the defendants' plant, nor have they presented any evidence that new employees of the company, if there have been any since the institution of this suit, are younger than the plaintiffs.

The Sixth Circuit Court of Appeals in the case of *Rose* v. *National Cash Register Corporation,* 703 F. 2d 225 (1983) held that it had "declined to adopt rigid guidelines exclusively establishing a method for proving a *prima facie* case in age discrimination actions." *Id.* at 227. It did say that plaintiff has the burden of proving "he was discharged because of age," citing *Laugesen* v. *Anaconda Company,* 510 F. 2d 307 (6th Cir. 1975); or that age must be a determining factor, *see Blackwell* v. *Sun Electric Corp.,* 696 F. 2d 1176, 1180 (6th Cir. 1983); or that age makes a difference, *see Ackerman* v. *Diamond Shamrock,* 670 F. 2d 66, 70 (6th Cir. 1982); or that age is a contributing factor, *see Sahadi* v. *Reynolds Chemical,* 636 F. 2d 116, 117 (6th Cir. 1980).

Probably the case nearest in point to similarity of facts is that of *Massarsky* v. *General Motors Corp.,* 706 F. 2d 111 (3rd Cir.) *cert. denied,* __ U.S. __, 104 S. Ct. 348 (1983). There the plaintiff relied upon theories of both disparate treatment and disparate impact. The Court recited that in order to establish a *prima facie* case of disparate impact, plaintiff was compelled to show that the employer's selection process resulted in unfavorable treatment of a disparate number of members of the protected group to which the plaintiff belongs. *Id.* at 120.

In *Massarsky, supra,* the Court pointed out that under the General Motors' policies, General Motors students who were insulated from layoffs may generally have been younger than employees who were laid off in their place. The Court pointed out that even if all the laid off employees were older than the students who received special treatment, ADEA would not be violated, unless those who were aged 40 to 70 were disparately represented among the laid off employees.

In the instant case, plaintiffs have simply failed to present the Court with statistical proof as to the effect of the layoff policies contained in the collective bargaining agreement. The Court has been presented with no proof as to what the age computation is of those members of the union who had not been on recall for more than two years.

The *Massarsky, supra,* case refers to *Geller* v. *Markham,* 635 F. 2d 1027 (2nd Cir. 1980), *cert. denied,* 451 U.S. 945 (1981). In that case, there was a hiring policy that made over 90% of the protected age class ineligible for appointment to teaching positions. The policy also resulted in the exclusion of the majority of teachers over the age of 40. In *Geller, supra,* the Court held that the defendant could not assert as a viable defense the employment policy which was based in part on purely economic cost-cutting grounds in the face of tight budgetary constraints. The Court cited 29 C.F.R. §860.103(h) (1979), *Marshall* v. *Arlene Knitwear, Inc.,* 454 F. Supp. 715, 728 (E.D. N.Y. 1978), and *Laugeson* v. *Analconda Co., supra.*

In the case at bar, no evidence has been produced as to the reason for the decision of the company to insist upon the provision that no employee with more than two years layoff should be recalled. The lack of such evidence, however, is not harmful to the defendants, since the plaintiffs have failed to present the Court with any evidence that would meet their *prima facie* burden of showing an em-

ployment practice that is facially neutral in its treatment of different groups but, in fact, falls more harshly on one group than another and cannot be justified by business necessity. *See International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977).

In light of the failure of the plaintiffs to present a *prima facie* case as to the age discrimination issue, the motion of the defendants for summary judgment will be granted. We have this day entered a judgment in accordance with these findings of fact, conclusions of law and memorandum opinion.

Dated 12-17-84

(s) Charles M. Allen
Charles M. Allen, Chief Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 84-0293 L(A)

GORDON PANTER, et al, - - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER
CORPORATION, et al., - - - - - *Defendants.*

JUDGMENT—Entered December 17, 1984

This action, having been heard by the Court without a jury on the plaintiffs' motion for a preliminary injunction, the evidence having been transcribed, and the Court, having entered its findings of fact, conclusions of law and memorandum opinion, and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that plaintiffs' motion for a preliminary injunction based upon alleged violation of the Landrum Griffin Act, the duty of fair representation, and KRS 344 *et seq.*, is hereby denied.

IT IS FURTHER ORDERED AND ADJUDGED that defendants' motion for summary judgment upon alleged violations of the duty of fair representation and KRS 344 *et seq.* is hereby granted.

IT IS FURTHER ORDERED that defendants' motion for summary judgment on plaintiffs' claim of Landrum Griffin Act violations is hereby denied.

This is not a final and appealable judgment, except as to that portion of the judgment which denies the plaintiffs' motion for a preliminary injunction which is appealable.

Dated 12-17-84

(s) Charles M. Allen
Charles M. Allen, Chief Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 84-0293-L(A)

GORDON PANTER, et al, - - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER CORP., et al, - - - - - - - *Defendants.*

MEMORANDUM OPINION—Entered November 1, 1985

This action is submitted to the Court on the motion of the defendant American Synthetic Rubber Corp. (hereinafter "ASRC") for summary judgment, and on the motion of the plaintiffs to file a second amended complaint. For the reasons set out below, the motion for summary judgment will be granted, and the motion to file a second amended complaint will be denied.

It will be recalled that this action was heard upon the plaintiffs' motion for a preliminary injunction, and that the Court entered its findings of fact, conclusions of law and memorandum opinion denying a preliminary injunction based upon alleged violations of the Landrum-Griffin Act and of the duty of fair representation contained in 29 U.S.C. §301 and K.R.S. 344, and the Court further granted summary judgment to all defendants as to these claims. It was also ordered that the defendant's motion for summary judgment on plaintiff's claims of the Landrum-Griffin Act violations was denied.

Subsequently it has been pointed out to the Court by ASRC that the courts have consistently held that the Landrum-Griffin Act does not apply to employers but only to the relationship between the union and its members. *See Thompson* v. *New York Central Railroad,* 361 F. 2d 137 (2nd Cir. 1966), *Gross* v. *Kennedy,* 183 F. Supp. 750 (S.D. N.Y. 1960), and *Pack* v. *Associated Food Distributors of New England, Local No. 138,* 237 F. Supp. 113 (D.C. Mass. 1965). It therefore follows that defendant's motion for summary judgment as to the Landrum-Griffin Act claims of the plaintiff is meritorious.

Plaintiffs now have tendered a second amended complaint wherein they allege that the ASRC has violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 *et seq.* No facts are alleged in support of this claim nor do the plaintiffs allege how the ERISA has been violated. It is apparent that if their claims of violation of ERISA are based upon their previous claims that they were wrongfully denied reemployment, they are barred from asserting such claims by virtue of the decision of the Court. Since the second amended complaint contains no allegations of fact as to how the plaintiffs' rights under ERISA were violated, the Court cannot determine what fact, if any, led to these claims. We therefore will deny the motion to file a second complaint with the proviso that plaintiffs may file a third amended complaint within thirty days of such complaint specifically alleges what provisions of ERISA were violated and in what manner. An order to this effect has been entered this day.

Dated 11-1-85

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 84-0293-L(A)

GORDON PANTER, et al, - - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER
CORP., et al, - - - - - - - *Defendants.*

ORDER—Entered November 1, 1985

The defendant, American Synthetic Rubber Corp., having moved for summary judgment, and the Court having filed its memorandum opinion,

IT IS ORDERED that the motion for summary judgment be granted as to the claims asserted in the first amended complaint.

IT IS FURTHER ORDERED that the plaintiffs' motion to file a second amended complaint is denied, subject to the right of the plaintiffs to file within thirty days a third amended complaint which sets out the provisions of ERISA which allegedly have been violated by the defendant and the manner in which they were violated.

This is not a final and appealable order.

Dated 11-1-85

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 84-0293-L(A)

GORDON PANTER, et al, - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER CORPORATION, et al., - - - - *Defendants.*

MEMORANDUM OPINION—Entered May 1, 1986

This action is pending before the Court on various motions. In order to understand these motions and the posture of the case, we will give a brief background of previous developments.

The original action was filed under the Labor Management Relations Act of 1947, as amended, Section 301(a) *et seq.*, Title 29 U.S.C. §185(a) *et seq.*, and the Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin) §101, 73 Stat. 519, *et seq.*, 39 U.S.C. §402 *et seq.;* and in addition under the Kentucky Age Discrimination Statute, K.R.S. Chapter 334 *et seq.*, by a group of laidoff workers against their ex-employer, American Synthetic Rubber Company (hereinafter ASRC), their local union and the union's international. The dispute grew out of a change in the company's labor management agreement which expired on March 1, 1984. Under that agreement, all laidoff employees with two or more years seniority had unlimited recall rights. However, under the new agreement ratified by the local union in March 1984, recall rights

for laidoff employees were to be terminated after two years of layoff. Plaintiffs in this case were all employees with more than two years seniority who had been laidoff for more than two years.

Under the union's constitution, laidoff employees could retain their union membership by either continuing to pay dues or asking for a dues exemption. If they failed to ask for a dues exemption, their union membership would be terminated after three months of nonpayment. Only two of the plaintiffs had asked for this extension, and in those cases, the exemption had expired before the meeting to ratify the new collective bargaining agreement was held by the union.

Plaintiffs claim they were allowed to speak at previous union meetings but were forbidden to speak or vote when the new agreement was approved by a vote of 79 to 7, which resulted in plaintiffs losing their recall rights.

On December 17, 1984 this Court denied plaintiffs' motion for a preliminary injunction, granted defendants' motion for summary judgment on the age discrimination claim and on the violation of the duty of fair representation but denied summary judgment on the Landrum-Griffin claim.

In 1985 the plaintiffs asked to file a second amended complaint dealing with an alleged violation of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 *et seq.* Following that motion, the Court granted the ASRC judgment as to all claims asserted in the first amended complaint and denied plaintiffs' motion to file a second amended complaint but gave them permission to file a third amended complaint, which sets out specifically the provisions of ERISA which were allegedly violated.

Following the tendering of the third amended complaint, the Court entered an order which allowed the plaintiffs to file the third amended complaint on the issue of whether

or not the plaintiffs were wrongly denied their severance pay. Following that order on December 18, 1985, the plaintiffs attempted to reiterate in their third complaint every statement made in their past complaints, renew the ERISA claim because it improved benefits that they would have received under the new collective bargaining agreement, and alleged a denial of severance pay. Following the filing of the third amended complaint, the motions are now under submission.

We are of the opinion that the motions of ASRC for summary judgment should be sustained as to all claims filed by the plaintiffs, with the exception of the severance pay. All of the issues which are raised by the third amended complaint have already been ruled on in the Court's previous orders, and in the interest of judicial economy, the Court refers the parties to its previous opinions.

Also we note that the ASRC motion for a more definite statement should be sustained in order to ascertain whether plaintiffs' claims for severance pay have any relation to an alleged violation of ERISA.

With regard to the union's motion for summary judgment as to the Landrum-Griffin Act claims of the plaintiffs, it is apparent that there are disputes of fact as to whether or not the plaintiffs were given the right to speak at the union meeting which ratified the collective bargaining agreement. There is also a question of law, the answer to which is not clear, as to whether or not persons have who have been members of a union but who no longer are members retain their rights under the Landrum-Griffin Act. In light of this situation, the Court declines to grant the motion of the union for summary judgment.

An order to this effect has been entered this day.

Dated 01 May 1986

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 84-0293-L(A)

GORDON PANTER, et al, - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER
CORPORATION, et al., - - - - *Defendants.*

ORDER—Entered May 1, 1986

Various motions having been filed with the Court, and the Court being fully advised,

IT IS ORDERED that the motion of defendant, American Synthetic Rubber Corporation, to dismiss, except as to severance pay and the Landrum-Griffin claim of the plaintiff, is granted.

IT IS FURTHER ORDERED that the motion of the defendant, American Synthetic Rubber Corporation, for a more definite statement is granted.

IT IS FURTHER ORDERED that the motion of the defendant union for summary judgment be, and it hereby is, overruled.

This is not a final and appealable order.

Dated 01 May 86

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 84-0293-L(A)

GORDON PANTER, et al, - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER CORPORATION, et al., - - - - *Defendants.*

MEMORANDUM OPINION—Entered September 5, 1986

This case is submitted to the Court upon the motion of the defendant Unions, Local 423 and the International Union, for summary judgment, and the motion to dismiss filed by the Defendant, American Synthetic Rubber Corporation, hereinafter referred to as "ASRC," which the Court will treat as a motion for summary judgment. The Court will first discuss the motion of the corporation.

Plaintiffs' claim that ASRC violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* by arbitrarily denying their claim to severance pay. In March 1981, ASRC and Local 423 agreed to a three-year collective bargaining agreement. Under that agreement, laid-off employees with two or more years of seniority retained recall rights no matter how long they had been on layoff unless they requested and received severance pay in which case they lost all seniority and recall rights. Under the new collective bargaining agreement entered into in March 1984 between the Union and ASRC, all employees who had been laid-off for more than two years lost their

right to recall. Again, even if they were laid-off for less than two years, they lost their seniority and recall rights under the new agreement if they requested and received severance pay.

The Union, in its negotiations with the company which led to the 1984 agreement, proposed that all former employees of the company who had been on layoff for more than two years should receive the right to severance pay provided that they made application for it within thirty days of the execution of the 1984-1987 agreement. The company refused to accept this proposal, but instead reached an agreement with the Union that Union members would have forty-eight hours after the 1984-1987 agreement was ratified within which to request their severance pay. A letter which informed these employees that they had to request their severance pay by March 9, 1984 was mailed on March 2, 1984.

None of the plaintiffs, with the exception of J.J. Edrington, made application for severance pay by March 9, 1984. Article XVIII of the 1981 contract provided that employees who decided to take severance pay would lose their seniority and recall rights upon receipt of that pay. It should also be noted that Edrington, in his letter requesting severance pay, stated that his acceptance of severance pay should not be construed as a waiver of his rights under the contract or under the law.

Plaintiffs' contention that ERISA was violated must be rejected. The right to severance pay constitutes a welfare plan that may be modified to the prejudice of some employees. Under the holding in *Sutton* v. *Weirton Steel*, 724 F. 2d 406 (4th Cir. 1983), employees' rights to severance pay may not only be modified without violating ERISA but must be governed by the pertinent employment agreements. *Id.*, at 410.

Plaintiffs' allegation that ASRC acted arbitrarily and capriciously in violation of ERISA does not state a claim. In *Sutton,* the court held that an employer, which is the administrator of a severance pay plan, would not breach its fiduciary responsibilities by agreeing with the unions to a modification which adversely affected some employees' rights to severance pay. The court clearly held that the law does not prohibit an employer from exercising the right to renegotiate or amend unfunded contingent benefits payable before normal retirement age. *Id.,* at 410-11.

Finally, the plaintiffs' claim that ASRC attempted to:

> coerce and manipulate Plaintiffs and others who were subject to termination [on] 3/1/84 to sign away any claim to any legal action against Defendant Company and Defendant Union regarding loss of seniority rights, all of which is a violation of ERISA, 29 U.S.C. § 1001 et seq., including but not limited to 29 U.S.C. § 1141.

Plaintiffs' reliance upon 29 U.S.C. § 1141 is misplaced since that statute is criminal in nature and can be enforced only in a criminal action. *See West* v. *Butler,* 621 F. 2d 240, 244 (6th Cir. 1980). However, Plaintiffs' claims under 29 U.S.C. § 1141 may be treated as though they were brought under 29 U.S.C. § 1140. *Id.* That civil prohibition section provides in essence that it is

> unlawful for any person to discharge, fine, suspend, ediscipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee benefit] plan, this title [29 U.S.C. §1001 *et seq.*], or the Welfare and Pension Plans Disclosure Act [29 U.S.C. §§301-309]. 29 U.S.C. §1140.

This provision is designed primarily to protect an individual's pension rights. *See West, supra,* 621 F. 2d at 245, *citing* 119 Cong. Rec. 30374 ("Especially vulnerable are managers and executives whose substantial pension potentialities provide an incentive to their discharge before vesting."

In the case at bar, ASRC did not suspend, discharge, expel, discipline or discriminate against the plaintiffs *because* they had exercised a right to which they were entitled under ERISA or an employee benefit plan or the Welfare and Pension Plan Disclosure Act. The only rights which Plaintiffs had to severance pay were conferred upon them by the 1981 collective bargaining agreement and by the memorandum agreement of 1984 between the Union and the ASRC. These rights were contractual in nature and Plaintiffs cannot point to any breach of contract even though the period of time given for exercising the severance rights was extremely short. However, the right to severance pay was strictly subject to negotiation between the Union and the company and the Court cannot interfere with an agreement legitimately reached between these two entities, notwithstanding the possibility that some plaintiffs conceivably may have lost their right to severance pay because of the shortness of time within which to make a decision as to whether to apply for the severance pay. We reach the conclusion therefore that the plaintiffs' remaining claims against ASRC, with the exception of Mr. Edrington's, should be dismissed with prejudice.

With regard to the Defendant Union's motion for summary judgment, the Plaintiffs contend that they had a right under the Landrum-Griffin Act, 29 U.S.C. §411 *et seq.* to participate in the vote which led to the ratification by the Unions of the 1984-1987 collective bargaining agreement. The problem with the Plaintiffs' theory is that Plaintiffs failed to maintain their status as union members prior to

the March 7, 1984 meeting which resulted in the ratification of the agreement. The Plaintiffs did not preserve their union membership. Under the terms of the union constitution, the Plaintiffs could have maintained their good standing as union members by obtaining a dues exemption. The failure to obtain a dues exemption for a period of ninety days caused them to forfeit all rights and privileges of union members. All of the members, except Gordon Panter, were removed from the membership rolls of the union in August 1981 after they had fallen three months behind in the payment of membership dues. Panter did receive a dues exemption but did not request an extension, even though an extension was authorized by the constitution. He therefore lost his union membership three months after his dues exemption expired.

In the case of *NLRB* v. *Financial Institution Employees of America*, __ U.S. __, 54 USLW 4203 (February 26, 1986), the Supreme Court held that the National Labor Relations Board could not promulgate a rule that required that non-union employees be permitted to vote in a certified union's decision whether to affiliate with other unions. The court based its decision in part upon the theory that the National Labor Relations Act allows unions members to control the shape and direction of their organization and as a result non-union employees have no voice in the affairs of the union. *Id.*, 54 USLW at 4207.

We are reinforced in our opinion by the language contained in *Alvey* v. *General Electric Company*, 622 F. 2d 1279 (7th Cir. 1980). That case points out that the Landrum-Griffin Act, 29 U.S.C. § 411(a)(1) guarantees all union members equal rights and privileges, including the right to participate in the deliberation and voting upon the business of membership meetings. That right, however, is not absolute. Section 411(a)(1) contains a proviso that makes the right subject to reasonable rules and regulations

in the union's constitution and by-laws. Section 411(b) also provides that constitutional or by-law provisions inconsistent with subsection (a) shall be of no force and effect.

In *Alvey,* the court pointed out that the right of a union to limit participation in union affairs to members in good standing is clearly reasonable. *Alvey,* 622 F. 2d at 1284. However, the court was "faced with a substantially more onerous rule that not only limited participation in union affairs to members in good standing but precluded . . . those on layoff" from payment of dues to maintain their good standing. As a result, the members on layoff were "barred from participating in all union matters regardless of their willingness to pay dues or the extent of which the union matters might compromise or nearly extinguish their rights." *Id.,* at 1284-85.

While the *Alvey* court held that the union's provision which precluded the former union members who were on recall from voting or speaking at union meetings on questions affecting their economic interests was of no force or effect, it specifically did so because the plaintiffs, who were on layoff, were precluded from maintaining their union membership.

In the instant case, the plaintiffs have not been precluded from remaining as union members. They could either have paid their dues on a current basis or obtain successive 90-day exemptions from payment of dues which would have allowed them to maintain their membership in good standing.

Finally, we note that 29 U.S.C. § 4020 provides that one is a member of a union organization when he has fulfilled the requirements for membership and has neither voluntarily withdrawn nor been expelled or suspended from membership. The failure to pay dues or to apply for an exemption from the failure to pay dues is a voluntary act on the part of the employees on recall. They were not

coerced into discontinuing their union membership but simply chose not to exercise their right to continue their union membership in the manner required by the union's constitution and by-laws.

We note also that 29 C.F.R. §§452.86 and 452.92 provide that a laidoff employee may maintain good standing for the purpose of remaining eligible to vote on union matters by tendering dues which the union cannot refuse to accept. Here the plaintiffs were granted that right by the union and yet failed to take advantage of the right guaranteed by both the union and the Code of Federal Regulations.

The Court recognizes that the interests of laidoff employees such as plaintiffs in matters that will alter or effectively extinguish their recall rights is a most vital one. *Alvey, supra,* 622 F. 2d at 1285. However, plaintiffs had the option of maintaining their rights to vote on these vital matters by either paying dues or procuring exemptions and failed to do so.

For the reasons set out above, the motion of the company and the union for summary judgment must be sustained.

Dated: 9-5-86

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
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GORDON PANTER, et al, - - - - - *Plaintiffs,*

v.

AMERICAN SYNTHETIC RUBBER
CORPORATION, et al., - - - - *Defendants.*

JUDGMENT—Entered September 5, 1986

Defendant, American Synthetic Rubber Corporation, having moved to dismiss the remaining claim of the plaintiffs, and the Court having considered said motion to dismiss as a motion for summary judgment, and having entered its memorandum opinion, and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that all remaining claims of the plaintiffs against the defendant, American Synthetic Rubber Corporation, are dismissed, with the exception of the claim of J. J. Edrington for severance pay.

IT IS FURTHER ORDERED AND ADJUDGED that the motion of the defendants, Local and International Unions, for summary judgment be, and they hereby are sustained for the reasons set out in the memorandum opinion of the Court.

This is not a final and appealable judgment.

Dated: 9-5-86

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

APPENDIX B

29 U.S.C. §402. Definitions

For the purposes of this chapter—

(o) "Member" or "member in good standing", when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

29 U.S.C. §411. Bill of rights; constitution and bylaws of labor organizations

(a)(1) Equal rights

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organiza-

tion to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, initiation fees, and assessments

Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of

such labor organization: *Provided,* That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) Protection of right to sue

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Invalidity of constitution and bylaws

Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

29 U.S.C. §412. Civil action for infringement of rights; jurisdiction

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

29 U.S.C. §1002. Definitions

For the purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. §1051. Coverage

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than—

(1) an employee welfare benefits plan . . .

29 C.F.R. §452.86 Vote conditioned on payment of dues.

A labor organization may condition the exercise of the right to vote upon the payment of dues, which is a basic obligation of membership. Such a rule must be applied uniformly. If a member has not paid his dues as required by the labor organization's constitution or bylaws he may not be allowed to vote. Thus, a rule which suspends a member's right to vote in an election of officers while the member is laid off and is not paying dues would not, in ordinary circumstances, be considered unreasonable, so long as it is applied in a nondiscriminatory manner. However, members must be afforded a reasonable opportunity to pay dues, including a grace period during which dues may be paid without any loss of rights. In the case where a member is laid off but desires to maintain his good standing and thus his membership rights by continuing to pay dues, it would be clearly unreasonable for the labor organization to refuse to accept his payment.

29 C.F.R. §452.92 Unemployed members.

Members who are otherwise qualified to vote may not be disqualified from voting merely because they are currently unemployed or are employed on a part-time basis in the industry served by the union, provided, of course, that such members are paying dues.